

## WILLS AND ESTATE PLANNING

**MATERIALS** 

ON

WILLS AND SUCCESSION TO PROPERTY

2001 - 2002



# WILLS AND ESTATE PLANNING

MATERIALS

ON

WILLS AND SUCCESSION TO PROPERTY

2001 - 2002

Digitized by the Internet Archive in 2018 with funding from University of Toronto

#### TABLE OF CONTENTS

#### 2001 - 2002

#### SECTION A: CONTROLS ON THE RIGHT OF DISPOSITION OF PROPERTY ON DEATH

# Part 1: Rights and Elections of Surviving "Spouses" on Death of a "Spouse" regarding "Net Family Property"

Family Law Act. R.S.O. 1990, c. F.J. ss 1, 2(10), 4-7, 14-16

	•	
	Act to amend Certain Statutes Because of the Supreme Court of Canada Decision in M. v. H., S. O. 1999, c. 6, s. 25	A . 1 . 7
	Rondberg Estate v. Rondberg Estate (1989), 70 O.R (2d) 146	1.1.6
Part	2: Protection of Dependants	
(A)	The Succession Law Reform Act	
	Succession Law Reform Act. R.S.O. 1990. c. S.26. ss 1(1-3). 57-79	2.4.
	Act to Amend Certain Statutes Because of the Supreme Court of Canada Decision in M. v. H. S.O. 1999, c. 6, s.s. 67,68	A.2.6a
	Red Tape Reduction Act. S.O. 1999. c. 12, Sch. B. s. 17	A.2.6c
(B)	The Applicant	
	Family Law Act. R.S.O. 1990, c. F.3, ss. 1(1), 29-32	A.2.7
	Act to Amend Certain Statutes Because of the Supreme Court of Canada Decision in M. v. H., S.O. 1999, c.6, ss. 25, 68	A.2.7a
	Re Cooper. (1980). 30 O.R. (2d) 113	A.2.8
	Re Mealey and Broadbent, (1984), 47 O.R. (2d) 761	A.2.12
(C)	The Nature and Extent of the Relief Granted	
	Re Davies and Davies. (1979). 27 O.R. (2d) 98	A.2.13
	McSween v. McSween Estate, (1985), 21 E.T.R.195	A.2.18
	Re Dentinger, (1982), 128 D.L.R. (3d) 613	A.2.27
(D)	Contracts and the Legislation	
	Schaefer v. Schuhmann. [1972] A.C. 572 (P.C.)	A.2.35
(E)	The Power to Vary an Order	A.2.45
(F)	Applicability of Part V of S.L.R.A.	A.2.45

# SECTION B: INTESTATE SUCCESSION IN ONTARIO

Part	1: Introduction	
	Devolution upon the Personal Representative	B.1.1
	Estates Administration Act. R.S.O. 1990. c. E.22, s. 2	B.1.2
Part	2: Distribution of Property on Intestacy: Deaths Before	March 31, 1978
(A)	The Spouse	B.2.1
	(i) Wife - Preferential Share	B.2.1
	(ii) Husband - Preferential Share	B.2.2
	(iii) No Preferential Share where Deceased Survived by Child of Former Marriage	B.2.2
	(iv) Distributive Share of Wife -"Legal Representatives" - "per Stirpes" distributions	B.2.3 B.2.4 B.2.4
	(v) Distributive Share of Husband	B.2.6
	(vi) Effect of Dower on Share of Wife	B.2.7
	(vii) Effect of Curtesy on Share of Husband	B.2.8
(B)	The Lineal Descendants	B.2.9
	"Advancements" to Children	B.2.9
(C)	Lineal Ascendants and Collaterals	B.2.10
	· Counting Degrees of Relationship	B.2.10
	- "Representation"	B.2.11
	- "per capita" distributions	B.2.15
(D)	Illegitimate Children	B.2.16
	The Legitimacy Act. R.S.O. 1970, c. 242	B.2.17
(E)	Where No Next of Kin Can be Ascertained	B.2.18
	Appendix to Part 2:	
	- A Short Note on "Curtesy" and "Dower"	B.2.19
Part	3: Distribution of Property on Intestacy: Deaths On and 1978	d After March 31,
(A)	The Succession Law Reform Act	B.3.1
	The Succession Law Reform Act. R.S.O. 1990, c. S.26, ss. 44-49	B.3.1
(B)	Spouses	B.3.3

((')	Child	ren and More Remote Issue	B , -
(D)	Ascen	dants and Collaterals	£ ,
(E)	Child	ren Born Out of Wedlock	B. 2 9
	(1)	Apolition of Tilegitimacy	B > 4
		Children's Law Retorm Act. R 5 U (1990, c) (12, 55) 2	B 3 10
	(11)	Enquiries	B 3 12
		Estates Administration Act. R $\sim$ 0 (1990), $\epsilon$ E 22, S 24	B.3 12
	(111)	Proof	B 3 13
		Children's Law Reform Act. R S O (1990, c. C.12, ss. 3-10, 12	B 3.13
(F)	Adopt	ed Children	B 3.17
	Child	and Family Services Act. R S t) (1940), c. C 11, ss. 158-159	B.3.17
SECT	TION B	B: INTESTATE SUCCESSION WITH RESPECT TO SO PERSONS	ME NATIVE
(A)	Introduct	ion	
	Note:		BB.1.1
	India	Act. R.S.C 1985, c I.5, ss 2, 4, 42-44, 47	BB.1.2
(B)	Distribu	ntion on Intestacy	
	India	n Act. R.S.C. 1985, c. I.J. ss. 48-50	BB.1.4
	TION C JMENTS	: WILLS - THE MAKING AND REVOCATION OF	F TESTAMENTARY
Part	1: Gen	eral	
(A)	Succe.	ssion Law Reform Act	
	( : )	General Definitions	
		Succession Law Reform Act. R.S.O. 1990, c. S.26, s. 1	C.1.1
	(ii)	What May Be Given by Will	
		Succession Law Reform Act, R.S.O. 1990, c. S.26, s. 2	C.1.2
	(iii)	Applicability of Part 1 of the Act	
		Succession Law Reform Act. R.S.O. 1990, c. S.26, s. 43	C.1.1
	(iv)	The Testamentary Act	
		Re MacInnes, [1935] S.C.R. 200	C.1.2
		<u>Anderson v. Patton</u> , [1948] 1 D.L.R. 848 (Alta. S.C.)	C.1.6
		Anderson v. Patton. [1948] 2 D.L.R. 202 (Alta. C.A.)	C.1.10

# Part 2: Testamentary Capacity, Undue Influence, and Fraud

(A)	Age	
	Succession Law Reform Act. R.S.O. 1990. c. S.26. s. 8	C.2.1
(B)	The "Sound. Disposing Mind"	
	Banks v. Goodfellow (1870), L.R. 5 Q.B.D. 549	C.2.1
	Leger v. Poirer. [1944] S.C.R. 152	C.2.10
	Re Davis. [1963] 2 O.R. 666	C.2.15
	<u>Parker v. Felgate</u> (1883). 8 P.D. 171	C.2.24
	O'Neil v. The Royal Trust Company. [1946] S.C.R. 623	C.2.26
(C)	Onus of Proof as to Testamentary Capacity	
	Barry v. Butlin (1838), 2 Moo. P.C. 480, 12 E.R. 1089 (P.C.)	C.2.33
(D)	Undue Influence, Fraud and "Suspicious Circumstances"	
	Wingrove v. Wingrove (1885), 11 P.D. 81	C.2.35
	Craig v. Lamoureux. [1920] A.C. 349 (P.C.)	C.2.36
	Eady v. Waring (1974), 2 O.R. (2d) 627	C.2.41
	<u>Vout v. Hay</u> . [1995] 2 S.C.R. 876	C.2.48
	Wintle v. Nye. [1959] 1 W.L.R. 284	C.2.54
	Russell v. Fraser (1981). 118 D.L.R. (3d) 733	C.2.65
	Re Worrell. [1970] 1 O.R. 184	C.2.72
	Cory, "A Whirl with Re Worrell", (1971) 5 LSUC Gazette 274	C.2.76
Part	3: Making of a Will - Formal Requirements	
(A)	Conflict of Laws	
	(i) The Succession Law Reform Act	
	Succession Law Reform Act, R.S.O. 1990, c. S.26, ss. 34-41	C.3.1
	(ii) The "International Will"	
	Succession Law Reform Act. R.S.O. 1990. c. S.26, s. 42	C.3.2
	(iii) Revocation by Marriage	
	Allison v. Allison (1999), 23 E.T.R.(2d) 237	C.3.5
(B)	Special Situations	
	Succession Law Reform Act. R.S.O. 1990, c. S.26, s. 5	C.3.6
	Indian Act. R.S.C. 1985. c. I.5, ss. 45, 46	C.3.6a
(0)		
(C)	"Formal" Wills  Succession Law Reform Act. D.S.O. 1990, C.S. 26, SS. 3, 4, 7	C 3 7

( )	"In writing"	
	Murray v haylow (1927) 60 () R 537	(
(i.)	Signed at End "by the testator or by some other person in his or her his or her direction"	presence and by
	Re White, [1948] 1 D.L.R 572	(* .; 4)
	Re Deeley and Green (1929), 64 O.E.R 535	C 3 43
(11i)	Attestation	
	Chesline v Hermiston (1928), 62 O.I. R 575	( 3 14
	Smith v. Smith (1866), 1 P & D 143	(-3-16-
	Brown v. Skirrow, [1902] P 3	( 3 13 G
	Re Brandrick and (ockle (1999), 140 D.L.R (4th) 113	C.3-19
	Re Brandrick and Cockle (1999).23 E.T.R.(2d) 233 (C $\Lambda$ )	C.3.23
	Re Chalcroft, [1948] P. 222	C.3.24
( įv.)	witnesses	
	Succession Law Reform Act, R.S.O. 1990, c. S.26, ss. 11-14	€.3.51
	Re Tretter, [1899] 1 Ch. 764	C.3 32
	Thorpe v. Bestwick (1881), 6 Q.B.D. 311	C.3 34
	Re Ray's Will Trusts. [1936] 1 Ch. 521	C.3.35
	Sisson v. Park Street Baptist Church (1999), 24 E.T.R.(2d) 18 C	.3.36a
Hologr	eaph Wills	
Succes	sion Law Reform Act. R.S.O. 1990. c. S.26, ss. 6.7	C.3.37
Benne t	<u>t v. Gray</u> , [1958] S.C.R. 392	C.3.38
Re Kin	<u>ahan</u> (1981), 9 E.T.R. 392	C.3.41
	v. Roman Catholic Episcopal Corp.  Diocese of London in Ontario. Ont. Ct. (Gen. Div.) April 15,1998	C.3.42a
Re Aus	tin (1967), 61 D.L.R. (2d) 582	C.3.43
Re Phi	<u>lip</u> (1979), 100 D.L.R. (2d) 582	C.3.48
Re For	<u>est</u> (1979), 5 E.T.R. 144	€.3.52
Re For	<u>est</u> (1981). 8 E.T.R. 232	C.3.57
Incorp	oration by Reference	
In the	Goods of Smart [1902] P.238	C.3.50
Re Min	alopulos (1956), 5 D.L.R. (2d) 628	C.3.62
Re Coa	te (1987) 26 E.T.R. 161	C.3.67

(D)

(E)

# Part 4: Revocation or Alteration of Wills

(A)	Gener	al		
	Succe	ssion Law Reform Act, R.S.O. 1990, c. S.26, ss. 15-17 (i)	C.4.1	
(B)	Revoc	ation by Operation of Law		
	( <u>i</u> )	Subsequent Marriage		
		Re Langston, [1953] P. 100	C.4.2	
		Re Pluto (1969). 6 D.L.R. (3d) 541	C.4.4	
		Re <u>Coleman</u> . [1976] Ch. 1	C.4.6	
		Layer v. Burns Philp Trustee Co. Ltd., (1986), 6 N.S.W.L.R. 60	C.4.11	
		Note re Conflict of Laws	C.4.15a	
	(ii)	wills Made in Exercise of a Power of Appointment		
		Re Paul. [1921] 2 Ch. 1	C.4.16	
		Re Gilligan. [1949] 2 All E.R. 401 (P.D.)	C.4.18	
	(iii)	Re Paul. [1921] 2 Ch. 1       C.4.16         Re Gilligan. [1949] 2 All E.R. 401 (P.D.)       C.4.18         (iii) Divorce       Re Majetka (1984). 8 D.L.R. (4th) 481       C.4.20         Page Estate v. Sachs (1993). 12 O.R. (3d) 371       C.4.23		
		<u>Re Majetka</u> (1984), 8 D.L.R. (4th) 481	C.4.20	
		Page Estate v. Sachs (1993). 12 O.R. (3d) 371	C.4.23	
(C)	Revocation by Act of the Testator			
	(i)	By Subsequent Testamentary Document: Express or Implied Revocation		
		<u>Re Davies</u> . [1928] 1 Cn. 24	C.4.26	
		Re Robinson. [1930] 2 Ch. 332	C.4.29	
		<u>Re Bryan</u> . [1907] p. 125	C.4.31	
	(ii)	By Physical Act		
		<u>Cheese v. Lovejoy</u> (1887), L.R. 2 P.D. 251	C.4.34	
		Leonard v. Leonard, [1902] P. 243	C.4.35	
		Re Kruschel Estate (1991), 40 E.T.R. 129	C.4.37	
		<u>Gill v. Gill</u> . [1909] P. 157	C.4.41	
	(iii)	By Alteration to the Will Document		
		Succession Law Reform Act. R.S.O. 1990, c. S.26, s. 18	C.4.42	
		Re <u>Itter</u> , [1950] P. 130	C.4.43	
		<u>King Estate v. King-Fleming</u> (Dec. 11, 1995)	C.4.45	
(D)	Revocation by Act of the Testator: Conditional Revocation (Including Herein the Revival of Previously Revoked Wills)			
		Giles v. Warren (1872)   L.R. 2 P. & D. 401	C.4.48	

Re Southerden, [1925] @ 177

		, , ,
	Re Sorenson (1982), to 1 T R 282	(* 4.52
	Dixon v Treasury Solicitor, [1905] P 42	( 4 %)
	Re Service (1964) 1 0 R 197	C.1 57
	Succession Law Reform Act. R S D 1890, c S 26, S 19	( 4 60
	Re Hodgkinson, [1893] P. 339 (C.A.)	C 4 61
	Re Ott. [1972] 2 O R 7	C 4 62
	Re Jones, [1976] 1 Ch. 201	C 4.67
Part	5: Curative Statutory Provisions	
	George v. Daily (1997), 15 E T.R. (Man C.V.)	€ 5 1
Part	6: Correction of Mistakes in the Will: The Probate Juris (This Part is omitted in 2001 2002 Materials)	diction
(A)	The Common Law Jurisdiction	
	Guardnouse v. Blackburn (1866), L.R. 1 P.&D. 109	(1.6.1
	Re Horrocks, [1939] P. 198	C.6.3
	Re Doner (1931), 40 O.W.N. 120	C.6.10
	Guardian, Trust, and Executors Co. of New Zealand Ltd. v. Inwood. [1946] N.Z.L.R. 614	C.6.11
	Re Brander, [1952] 4 D.L.R. 688	C.6.16
	Re Morris. [1971] P. 62	C.6.17
	Re Reynette-James. [1976] 1 W.L.R. 161	C.6.23
	Re Phelan. [1972] Fam. 33	C.6.26
	Re <u>Tait</u> . [1957] V.R. 405	C.6.27
(B)	A Statutory Remedy	
	Administration of Justice Act 1982 (U.K.), 1982, c. 53, s.20	C.6.33
	Note: <u>wordingham v. Royal Exchange Trust Co. Ltd.</u>	€.6.33
(C)	The Jurisdiction of the Court of Construction Compared	
	Re Craig (1977), 14 O.R. (2d) 589 (High Court of Justice)	C.6.34
	Re Craig (1978), 42 O.R. (2d) 567 (Court of Appeal)	€.6.42
CDCC	TANK D. THE CONCEDUCATION OF MALED THE TRANSPORTATION DO	OT DATES IEE

## SECTION D: THE CONSTRUCTION OF VALID TESTAMENTARY DOCUMENTS

## Part 1: General Principles

( 1 1)

## viii

Re Price, [1955] O.W.N. 18	D.1.6
Re <u>Helliwell</u> . [1916] 2 Ch. 580	D.1.8
<u>Re Cook</u> . [1948] 1 Ch. 213	D.1.10
David O. The Tantalan's Association	
Part 2: The Testator's Armchair	
Note re <u>Higgins</u> v. <u>Dawson</u>	D.2.0a
<u>Higgins v. Dawson</u> . [1902] A.C. 1	D.2.1
The <u>National Society for the Prevention of Cru</u> v. The <u>Scottish National Society for t</u> <u>Cruelty to Children</u> . [1915] A.C. 207	
Re Glassington. [1906] 2 Ch. 305	D.2.8
Re Ofner, [1909] 1 Ch. 60	D.2.10
Re Smalley. [1929] 2 Ch. 113	D.2.14
<u>Re Herlichka</u> . [1969] 1 O.R. 724	D.2.17
<u>Re Van Lessen</u> , [1955] 1 W.L.R. 1326	D.2.19
Re <u>Jeffery</u> , [1914] 1 Ch. 375	D.2.21
<u>Re Ottewell</u> (1970), 9 D.L.R. (3d) 314	D.2.22
<u>Haidl v. Sacher</u> (1978), 2 E.T.R. 288 (Saskatch	ewan Q.B.) D.2.24
Hickey v. Grieg (1987), 27 E.T.R. 17	D.2.30
Part 3: Direct Evidence of Intention	
<u>Doe d. Gord v. Needs</u> (1836), 2 M. & W. 363; 15	0 E.R. 698 D.3.1
<u>Doe d. Simon Hiscocks v. John Hiscocks</u> (1839). 151 E.R. 154	5 M. & w. 363; D.3.2
Re Gray. [1934] O.w.N. 17	D.3.3
Re Ray. [1916] 1 Ch. 461	D.3.5
Administration of Justice Act. 1982 (U.K.). 19	82. c. 53. s. 21 D.3.7
Re Williams, [1985] 1 W.L.R. 905	D.3.8
Part 4: Problems as to Nature of Property D	isposed of By the Will
(A) The Classification of Legacies, and the Conseq	nuences Thereof: Ademption and Abatement
Note: Problems Relating to the Disposition of in the Will	Property Described D.4.1
Re <u>willcocks</u> , [1921] 2 Ch. 327	D.4.4
Re Millar (1927), 60 O.L.R. 434	D.4.5
<u>Page v. Leapingwell</u> (1812), 18 Ves. Jn. 463; 3	4 E.R. 392 D.4.7
Re Webster. [1937] 1 All E.R. 602	D.4.9

	Re Cuipertson (1967), 62 D ! R $(2d)$ 134 (Saskatchewan Court of Appea)	0 4 11
	Re Hunter (1975), 8 O.R. (2d) 399	\$ 1 <del>1</del> 1
	Mental Health Act. R S $\odot$ 1990, c $\odot$ M 7, s $\odot$ 64	D 4 15
	Mental Incompetency Act. R S O 1990 c M 9, S 18 (1)	D 4 17
	Substitute Decisions Act. S.O. 1991, c. 30, s. 36	F) 4 15
	Advocacy. Consent and Substitute Decisions Statute Law Amendment Act. 1996	D 4.15
	Succession Law Reform Act. R.S $\theta$ = 1990, $c$ = 5/26, $s$ = 20	0 4.16
(B)	The Time from Which a Will "Speaks" with Respect to Property	
	Succession Law Reform Act. R.S.O. 1990. c. S.26, ss 21, 22	D 4.17
	Goodland v Burnett (1885), 1 K. & J. 341; 69 E.R. 489	D.4.17
	Re Tnompson (1919), 45 O.L.R 520	D.4.19
	Re Sikes, [1927] 1 Ch. 365	D.4.22
	Re <u>Ruthertord</u> (1918), 42 O.L.R. 405	D 4.23
	Re Portal and Lamb (1885), 30 Ch. D. 50	D.4.24
	Morrison v Morrison (1885), 10 O.R. 303	D.4.27
	Re Forbes (1956). 3 D.L.R (2d) 653	D.4.31
	Re Bird . [1942] O.R. 415	D.4.33
(C)	The Possible Effect of the Equitable Doctrine of Conversion	
	<u>Church v. Hill</u> . [1923] S.C.R. 642	D.4.36
	Hicks v. McClure (1922), 64 S.C.R. 361	D.4.39
	Succession Law Reform Act. R.S.O. 1990, c. S.26, s. 20	D.4.40
(D)	Is the Property Really Gone, or Just Disguised?	
	Re Clifford, [1912] 1 Ch. 29	D.4.41
	<u>Re Brems</u> . [1963] 1 O.R. 122	D.4.43
	Re Cudeck (1977), 16 O.R. (2d) 337 (C.A.)	D.4.44
	<u>Doyle v. Doyle Estate</u> (1995), 9 E.T.R.(2d) 162	D.4.47
	<u>Doyle v. Doyle Estate</u> (1998), 22 E.T.R.(2d) 17 (C. A.)	D.4.51
Part	5: Some Problems Arising as Change Affects Beneficiaries	
(A)	Where a Beneficiary Named in the Will Predeceases the Testator: The Doctr	ine of Lapse
	Note on the Doctrine of Lapse	D.5.1
	Re Ladd. [1932] 2 Ch.219	D.5.5
	<u>Re Mackie</u> (1986). 54 O.R. (2d) 784	Ð.5.8
	Re Greenwood, [1912] 1 Ch.392	D.5.11
	Re Cousen's Will Trusts. [1937] 1 Ch. 381	D.5.13

	Convey	vancing and Law of Property Act. R.S.O. 1990, c. C.34, s. 13	D.5.18	
	Act to	Amend Certain Statutes Because of the Supreme Court of Canada Decision in M. v. H., S.O. 1999, c. 6, s.13	D.5.18	
	Re Gar	mble (1906), 13 O.L.R. 299	D.5.18a	
	Succes	ssion Law Reform Act, R.S.O. 1990, c. S.26, s. 31	D.5.19	
	Douce	tte v. Fedoruk Estate (1993), 49 E.T.R. 199	D.5.20	
(B)	Сонно	rientes Legislation		
	Succes	ssion Law Reform Act, R.S.O. 1990, c. S.26, ss. 55, 56	D.5.23	
	Insura	ance Act, R.S.O. 1990, c. I.8. ss. 215, 194	D.5.24	
	Insura	ance Act. R.S.O. 1990, c. I.8, ss. 319, 314(1), 314(2)	D.5.24	
(C)	Class	Gifts		
	(i)	General		
		Note: Gifts to Classes	D.5.25	
	(ii)	Is the Gift a "Class Gift"?		
		Kingsbury v. Walter. [1901] A.C. 187	D.5.27	
		<u>Re Jackson</u> (1880), 25 Ch.D.162	D.5.31	
		Re Telfer, [1964] 1 O.R. 373	D.5.34	
		<u>Re Hutton</u> (1983), 39 O.R. (2d) 622	D.3.35	
		Re Burgess (1968), 67 D.L.R. (2d) 526	D.5.38	
	(iii)	Determining the Membership of the Class: the "Class-Closing Rules"		
		Re Chartres, [1927] 1 Ch. 466	D.5.43	
		Re Bleckly, [1951] 1 Ch. 740	D.5.48	
		<u>Latta v. Lowry</u> (1886). 11 O.R. 517	D.5.54	
		Re Clifford's Settlement Trusts. [1981] 1 Ch. 63.	D.5.55	
		Rogers v. Mutch (1878), 10 Ch. D. 25	D.5.58	
		The Perpetuities Act. R.S.O. 1990, c. P.9. s. 7	D.5.59	
		The Trustee Act. R.S.O. 1990, c. T.23. s. 65	D.5.60	
SECT	TON F	: WILLS AND ESTATES CHECKLIST		
L 2 L A L 2 L	- 1 F15 F -	- VF B A 4 A 4 A 5 F F F F B 4 A 5 F F F B 4 A 5 F F F F F F F F F F F F F F F F F F		

Checklist and Notes prepared by the Professional Standards Committee, Law Society of Upper Canada, June, 1995

E.1.1